

RUST ENGINEERING AND CONSTRUCTION
INC., TRECO CONSTRUCTION SERVICES
INC. and WHEELABRATOR FALLS INC.,

Plaintiffs,

v.

J.C. ZAMPELL CONSTRUCTION, INC.,
and LIBERTY INSURANCE CORP.,

Defendants,
Third Party Plaintiffs,

v.

AMERICAN REFRACTORIES CO., INC.
t/d/b/a GEORGE E. SNYDER
CONTRACTORS, and NATIONAL UNION
FIRE INSURANCE CO. OF PITTSBURGH,
PENNSYLVANIA,

Third Party Defendants,

DECEMBER 11, 1997

I. INTRODUCTION.

Rust Engineering and Construction ("Rust"), Treco Construction Services Inc. ("Treco")¹, and Wheelabrator Falls Inc., ("Wheelabrator") and (collectively "Plaintiffs") have filed a complaint seeking declaratory judgement against a sub-contractor, J.C. Zampell Construction Inc. ("Zampell"), and Zampell's insurer, Liberty Insurance Company ("Liberty"). Zampell and Liberty (collectively "Defendants" or "Third-party Plaintiffs") filed a Third-party Complaint against National Union

¹ At the time the contract was executed Treco was known as the Rust Engineering Company. To distinguish this entity from Rust Engineering and Construction, I will refer to it as Treco.

Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") and its insured, American Refractories Co., Inc. t/d/b/a George E. Snyder Contractors ("Snyder")(collectively "Third-party Defendants"), a sub-subcontractor of Zampell.

Plaintiffs have filed a Motion for Summary Judgment against Liberty and Zampell. Liberty and Zampell have filed a Motion for Summary Judgment against either Plaintiffs or Third-party Defendants. Third-party Defendants have filed a Motion for Summary Judgment against Third-party Plaintiffs.

Due to the complicated nature of this matter, oral arguments were heard on December 5, 1997. For the reasons that follow, Plaintiffs' Motion is granted as to Liberty but denied as to Zampell, Liberty and Zampell's Motion is denied as to both Plaintiffs and Third-party Defendants, and Third-party Defendant's Motion is granted.

II. FACTS.

This action for a declaratory judgment arises out of a personal injury suit filed in the Bucks County Court of Common Pleas by Gavin Melville ("Melville").² Melville, an employee of Snyder, alleges that he fell on snow and ice in a parking lot at the Falls Township Facility on his way to work.

Wheelabrator, owner of the Falls Township Facility, was in the process of constructing a trash-to-steam plant on the site. Wheelabrator hired Rust as engineer and Treco as

² Melville v. Rust Engineering Co., et al., Bucks County Court of Common Pleas, Docket No. 95-009700-19-2.

contractor for the project. Treco hired Zampell as one of several subcontractors on the job. Specifically, pursuant to the sub-contract, Zampell was to provide "refractory supply and installation." Zampell entered into a sub-subcontract with Snyder, pursuant to which Snyder was to provide "refractory linings for two solid waste boilers." Melville was hired by Snyder as a bricklayer.

Melville's complaint alleges that his fall and resulting injuries occurred due to the negligence of Rust, Zampell, and Wheelabrator. Rust, Zampell and Wheelabrator answered Melville's state court complaint. Rust and Wheelabrator asserted a cross claim against Zampell for indemnification under the sub-contract.³ Zampell filed a third party complaint against Snyder and National Union for indemnification under the sub-subcontract.

The present action for declaratory judgment was filed by Plaintiffs against Zampell and Liberty pursuant to 28 U.S.C. § 2201.⁴ Plaintiffs allege that they are additional insureds under the Liberty policy issued to Zampell, and, Liberty must defend and indemnify them in the underlying state court action. Zampell and Liberty joined Snyder and National Union as Third-party

³ Rust, Treco and Wheelabrator also filed a joinder complaint against James D. Morrissey, Inc., ("Morrissey") the contractor responsible for site preparation and snow and ice removal.

⁴ Morrissey and PMIC were also named as defendants in the declaratory judgment complaint but have since been dismissed by stipulation. See supra note 3.

Defendants in this action. In the Third-party Complaint, Zampell contends that it is an additional insured under the National Union Policy issued to Snyder. Liberty argues that if it must defend and indemnify Plaintiffs, then National Union owes a defense and indemnification to Zampell under the terms of the insurance contract issued to Snyder.

National Union argues that its policy covers only Snyder not Zampell or Liberty. Snyder argues that it is only liable to Zampell for its own negligence, and because it was not negligent, there is no liability under the policy.

III. STANDARD.

Summary Judgment is proper "if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247 (1986); Kiewit Eastern Co. v. L & R Construction Co., 44 F.3d 1194, 1198 (3d Cir. 1995). The moving party has the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Then, the non-moving party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(c). If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir.

1987).

Cross-motions for Summary Judgment do not necessitate the determination of the case at that stage. Rains v. Cascade Indus., 402 F.2d 241, 245 (3d. Cir. 1968). The standard applied remains the same. U.S. v. Hall, 730 F. Supp. 646, 648 (M.D. Pa. 1990). Each party has the burden to prove the absence of a genuine issue of material fact and that judgment in their favor is proper as a matter of law. Id.

IV. DISCUSSION.

Two issues are presented by the Motions for Summary Judgment pending before the Court. First, the additional insured endorsement of Zampell's insurance policy must be interpreted to determine whether or not Liberty must defend and indemnify Plaintiffs in the underlying state court action. Second, if it is determined that Liberty must defend and indemnify Plaintiffs, then the National Union policy issued to Snyder must be similarly interpreted to determine Liberty's right to a defense and indemnification from National Union.

A. Liberty must defend and indemnify Plaintiffs.

The sub-contract between Zampell and Rust contains an indemnification clause which provides in relevant part:

13. INDEMNIFICATION

(a) Subcontractor agrees for itself and its insureds to indemnify, defend and hold harmless [Plaintiffs] from and against any and all liabilities, claims, losses, damages, penalties, costs or expenses (including but not limited to court costs and reasonable attorney's fees) for . . . injury to persons (including but not limited to death) arising out of or due to or claimed to have arisen out of or been due to . . . the performance of the Work by Subcontractor, its

agents, independent contractors, Sub-Subcontractors, Vendors, and each of their agents, officers, or employees, or any other operation no matter by whom performed for or on behalf of Subcontractor. Subcontractor's obligations under this indemnity shall not extend to property damage or personal injury to the extent caused by the negligence of the indemnitee its agents, officers, director, employees, and assigns.

The last sentence quoted above clearly limits the extent of Zampell's duty to indemnify Plaintiffs. Material issues of fact exist regarding Zampell's duty to indemnify Plaintiffs under the sub-contract. These issues will be determined in the underlying state court action, and preclude the entry of Summary Judgment against Zampell at this time.⁵

Despite the limiting language of Article 13, Liberty included the following endorsement in its policy of insurance:

SECTION II - WHO IS AN INSURED is amended to include as an insured any person or organization for whom you have agreed in writing to provide liability insurance, but only with respect to liability arising out of your operations or premises owned by or rented to you.

(emphasis added).

In Article 14 of the sub-contract Zampell agreed in writing to provide primary insurance to Plaintiffs. As between Plaintiffs and Liberty, the issue to be decided is whether Melville's fall arose out of Zampell's operations. Judicial

⁵ At oral argument, counsel for Plaintiff's conceded the existence of factual questions surrounding Zampell's duty to indemnify Plaintiffs under Article 13 of the subcontract and stated that he was not seeking Summary Judgment as to Zampell. Tr. of Dec. 5, 1997 hearing at 33. Despite this statement, Plaintiffs' Motion for Summary Judgment is designated as against both Liberty and Zampell. To avoid any confusion I will consider Plaintiff's Motion as against both Defendants.

interpretation of an insurance policy is a question of law when the facts are undisputed. Pacific Indem. Co. v. Linn, 766 F.2d 754, 760 (3d Cir. 1985). Because the facts of this case are not in dispute, this Court may properly interpret the policy at issue.

When the words in an insurance policy are clear and unambiguous, effect must be given to their plain and ordinary usage. Pacific Indem. Co., 766 F.2d at 760-61. Determining whether or not an insurance policy is ambiguous is a question of law, appropriate for determination by the Court. Id. at 760. Focusing on the phrase "arising out of your operations" contained in the additional insured endorsement, I find the Liberty policy is unambiguous as a matter of law.

In Pennsylvania, the phrase "arising out of" has been broadly interpreted to mean but-for causation, not proximate cause. Maryland Casualty Co. v. Regis Ins. Co., No. 96-1790 1997 WL 164268 at *3 (Ap. 9, 1997 E.D.Pa)(citing Forum Ins. Co. v. Allied Security Inc., 866 F.2d 80 (3d Cir. 1989); Pennsylvania Turnpike Comm. v. Transcontinental Ins. Co., 1995 WL 465197 No. 94-5039 (E.D. Pa. Aug.7, 1995); Township of Springfield v. Ersek, 660 A.2d 672 (Pa. Commw. Ct. 1995), alloc. denied, 675 A.2d 1254(1996)). The term "your" refers to Zampell, the named insured. The term "operations," given its plain and ordinary meaning, means the "[e]xertion of power; the process of operating or mode of action; an effect brought about in accordance with a definite plan; action or activity; a process or series of acts

performed to effect a certain purpose or result." Black's Law Dictionary 984 (5th Ed. 1978).

Zampell contends that its operations were limited to supervision. Plaintiffs point out the broad description of Zampell's work contained in the sub-contract, and argue that Zampell's operations included more than mere supervision. The language of the contract is decisive. By its terms, Zampell was required to furnish "all supervision, administration, labor, tools, construction equipment, and all necessary supplies and incidentals." Zampell's "operations" clearly encompassed more than mere supervision.

Zampell executed the sub-subcontract with Snyder in order to facilitate its performance of the sub-contract with Treco. By hiring Snyder, Zampell performed one of a series of acts intended to result in completion of the job at the Falls Township Facility. Zampell's act of hiring Snyder falls directly within the plain and ordinary meaning of the word "operations." Snyder employed Melville to further its completion of Zampell's operations on the site. Melville would not have fallen "but for" Zampell's operations, therefore, Liberty must defend and indemnify Plaintiffs.

B. Third Party Defendants are not required to defend or indemnify Third Party Plaintiff Liberty.

Having found that Liberty must defend and indemnify Plaintiffs, the second issue is whether Snyder or National Union owe a defense and indemnification to Liberty through the policy

issued to Snyder. Liberty claims to be "contractually" entitled to a defense and indemnification from either Snyder or National Union. Liberty's basis for this assertion is unclear. Liberty has not identified any contract between itself and either Snyder or National Union. Without such a contract, Liberty cannot be contractually entitled to indemnification.

Liberty attempts to shift its duty to defend and indemnify Plaintiffs to National Union by showing that Zampell qualifies as an additional insured under the National Union policy issued to Snyder. Liberty fails to explain how Zampell's status as an additional insured under the National Union policy would affect Liberty's duty to defend and indemnify Plaintiffs. The rationale behind this argument is irrelevant, however, because Zampell is not an additional insured under the National Union policy issued to Snyder.

Liberty argues that Zampell qualifies as an additional insured through the following provision in Snyder's National Union policy:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) - Is amended to include as an insured the person or organization (called "additional insured") shown in the schedule but only with respect to liability arising out of:

- A. Your work for the additional insured(s) at the location designated above, or
- B. Acts or omissions of the additional insured(s) in connection with their general supervision of "your work" at the location shown in the schedule.

Liberty argues this endorsement provides for Zampell's coverage additional insured. National Union points out Zampell's absence from either the schedule or the declarations page, as required by the language of the endorsement. Because Zampell is not named on the schedule or on the declarations page, they do not qualify as an additional insured under the above quoted endorsement to the National Union policy.

Alternatively, Liberty argues that Zampell is named as an additional insured on a certificate of insurance dated November 30, 1993. The certificate provides in relevant part: "Wheelabrator Falls, Inc., J.C. Zampell Construction, Inc., RUST International Corp., and the Rust Engineering Company are added as additional insureds, as respects work done by General Refractories." Liberty's argument must fail, however, because Snyder trades and does business as "American Refractories" not as "General Refractories."

Finally, Liberty argues that Snyder's agreement to defend and indemnify Zampell in the sub-subcontract requires Snyder to defend and indemnify Liberty. The indemnification clause of the sub-subcontract is triggered only if Snyder was negligent, and then, only to the extent of Snyder's negligence. The degree of Snyder's negligence is a disputed issue of material fact that will be determined in the underlying state court action.⁶ This issue precludes the entry of Summary Judgment in

⁶ Snyder was not directly named as a defendant in the underlying action because, as Melville's direct employer, it is immune under the Workmen's Compensation Act. 77 Pa.C.S.A. §

favor of Snyder at this time.

C. Plaintiffs' Request for Costs and Attorney's Fees.

Plaintiffs seek to recover the fees and costs expended in prosecuting this action for declaratory judgment. Plaintiffs are entitled to recover costs and fees only if Liberty's refusal to defend Plaintiffs was made in bad faith. Maryland Casualty Co., 1997 WL 164268 at *7 (citing Kiewit Eastern Co., Inc., 44 F.3d at 1205). Because I find no evidence of bad faith, Liberty is not required to reimburse Plaintiffs.

Plaintiffs also seek to recover the fees and costs expended in defending themselves in the underlying state court action. "When an insurer erroneously denies its duty to defend, fulfillment of the duty requires the insurer to pay for any defense costs already incurred." Kiewit Eastern Co., Inc., 44 F.3d at 1205. Because Liberty erroneously denied Plaintiffs' defense, Liberty must reimburse Plaintiffs for costs incurred in defending the underlying action. Liberty's duty to defend arose when Plaintiffs were served with the Melville complaint. Id. Counsel for Plaintiffs is directed to submit an affidavit setting forth the amount of expenses incurred from that date.

V. CONCLUSION.

Based on the undisputed facts of record, Liberty must defend and indemnify Plaintiffs in the underlying state court

481(a). Apparently, Snyder waived its immunity as to third parties in the sub-subcontract, therefore, depending on the degree of its negligence, Snyder could be required to indemnify the Defendants in the underlying action.

action. Plaintiffs are entitled to recover, from Liberty, fees and costs incurred in defending the underlying state court action. Liberty is not entitled to a defense or indemnification from National Union.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA**

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RUST ENGINEERING AND CONSTRUCTION	:	
INC., TRECO CONSTRUCTION SERVICES	:	CIVIL ACTION
INC. and WHEELABRATOR FALLS INC.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	NO. 96-8706
	:	
J.C. ZAMPELL CONSTRUCTION, INC.,	:	
and LIBERTY INSURANCE CORP.,	:	
	:	
Defendants,	:	
Third Party Plaintiffs,	:	
	:	
v.	:	
	:	
AMERICAN REFRACTORIES CO., INC.	:	
t/d/b/a GEORGE E. SNYDER	:	
CONTRACTORS, and NATIONAL UNION	:	
FIRE INSURANCE CO. OF PITTSBURGH,	:	
PENNSYLVANIA,	:	
	:	
Third Party Defendants,	:	
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ORDER

AND NOW, this 11th day of December, 1997, upon consideration of Plaintiffs' Motion for Summary Judgment against Defendants, Defendants' Motions for Summary Judgment against either Plaintiffs or Third-party Defendants, and Third-party Defendants' Motion for Summary Judgment against Third-party Plaintiffs, and all responses thereto, it is hereby ORDERED that:

1. Plaintiffs' Motion for Summary Judgment is GRANTED as to Liberty Insurance Corporation and DENIED as to J.C. Zampell Construction Inc.;

2. Defendants' Motion for Summary Judgment is DENIED as to both Plaintiffs and Third-party Defendants;

3. The Motion of Third-party Defendant American

Refractories Co., Inc., t/d/b/a George E. Snyder Contractors for Summary Judgment is DENIED;

4. The Motion of Third-party Defendant National Union Fire Insurance Co. of Pittsburgh, Pennsylvania for Summary Judgment is GRANTED;

5. Plaintiffs' request for attorney's fees expended in prosecuting this declaratory judgment action is DENIED; and

6. Plaintiffs' request for costs and attorney's fees expended in defending the matter known as Melville v. Rust Engineering Co., et al., filed in the Bucks County Court of Common Pleas, Docket Number 95-009700-19-2, is GRANTED as to Liberty Insurance Corporation. Plaintiffs' Counsel is directed to submit an affidavit setting forth the amount of fees and costs accrued to date within 15 days.

BY THE COURT:

Robert F. Kelly J.